IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1148 of 2001
with
civil application no. 11565 of 2001 in
SPECIAL CIVIL APPLICATION NO. 1148 OF 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT ELECTRICITY BOARD

Versus

L D DETROJA

Appearance:

1. Special Civil Application No. 1148 of 2001
MR VT ACHARYA for Petitioner No. 1
MS RV ACHARYA for Petitioner No. 1
MR TR MISHRA for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 9.4.2002.

ORAL JUDGEMENT

Heard learned advocate Ms. Acharya for the petitioner and Mr. T.R. Mishra for the respondent workman. By way of this petition under Article 226 /227 of the Constitution of India, the petitioner Board has challenged the award made by the labour court concerned in Reference No. 1692 of 1989 dated 28th September, 1999 wherein the labour court concerned has granted reinstatement with continuity of service with 50 per cent of the back wages for the intervening period.

During the course of hearing, learned advocate Ms. Acharya has submitted that as per annexure -B page 16, the respondent was appointed on 26th June, 1986 and worked upto 13th October, 1989 on periodical basis and in each occasion, separate orders were issued by the Board on different posts and, therefore, though the workman has completed 240 days or has remained in continuous service for a period of more than 12 months, he is not entitled for the benefit of section 25-F of the Industrial Disputes Act, 1947 in view of the provisions of section 2(oo)(bb) of the Industrial Disputes Act, 1947 and the labour court concerned has erred in not appreciating this aspect of the matter and, therefore,this Court should interfere with the award in question in exercise of the powers under Article 226/227 of the Constitution of India. Except these submissions, no other submissions were made by Ms. Acharya on behalf of the petitioner Board.

2. As against that, learned advocate Mr. Mishra for the respondent workman has submitted that the labour court has considered all these aspects while passing the award in question. The labour court has, after considering the periodical appointments on different posts at different point of time, come to the conclusion that these are artificial breaks intentionally given by the respondent Board and it amounts to arbitrariness on the part of the Board and once if it is proved that there is mala fide intention and arbitrariness in issuing such type of periodical orders, then, the provisions of section 2(oo)(bb) would not apply and it is not simply periodical orders but such orders on periodical basis on different posts were issued only with a view to deprive the respondent of his legitimate rights and such type of tactics have been adopted by the petitioner board and, therefore the labour court has rightly concluded that these are artificial breaks intentionally given by the Board which amounts to unfair labour practice, mala fide and exploitation by the respondent Board and, therefore, the labour court has rightly come to the conclusion that the respondent has completed 240 days' continuous service

and section 25F not followed by the Board and, therefore, the labour court granted reinstatement with continuity of service and therefore it made the award of reinstatement. As regards the back wages, he has submitted that while considering the aspect of back wages, the labour court has kept in view that the petitioner is a public body and it will not be proper to burden the petitioner board by granting full back wages and, therefore, it granted only 50 per cent of the back wages for the intervening period and thus, the award made by the labour court is just and proper requiring no interference of this court.

I have considered the submissions made by both the learned advocates. I have also perused the award in question made by the labour court. Before the labour court, the respondent workman has challenged the termination order dated 13th October, 1989 by filing statement of claim at Exh. 7 and written statement thereto was filed at Exh.1 2 and then, documents were produced by the petitioner Board at Exh. 26 which have been exhibited and then, the respondent was examined at Exh. 14 and the petitioner board has examined one Kantibhai Ranchhodbhai at Exh. 23 and thereafter, written arguments were submitted by both the parties and ultimately the labour Court examined the merits of the matter. As regards the contention of the petitioner that the respondent was being appointed on periodical basis by issuing periodical appointments on different posts and, therefore, it does not amount to retrenchment in view of the provisions of section 2(oo)(bb) of the I.D. Act, 1947, the labour court has examined what is certain period of appointment as per section 2(oo)(bb) of the I.D. Act, 1947 and has then come to the conclusion that these are not the appointments for a fixed period because each appointment was for a period of about 2/3 months and every time after completion of the period,the workman was being appointed for a different further period and on that basis, he continued to remain in service with the board. In view of these facts, the labour court has come to the conclusion that section 2(oo) (bb) of the I.D.Act would not apply. The labour court has also considered that by each order, the respondent was being appointed for a fixed period of 30 days or 60 days, no doubt for a period as specified in the order but immediately thereafter, the respondent was being appointed for a further period and he thus remained in service from 1986 to 1989 continuously excepting the break of 2 to 4 days on each occasion. IN view of these facts, the labour court has recorded the conclusion that such type of appointments on periodical basis were considered as arbitrary and mala fide and exploitation on the part of

the petitioner body. At this stage, it is required to be noted that such type of appointments on periodical basis were being given by the board just to get rid of the statutory provisions and just to deprive the workman of his legitimate rights and such type of appointments for a specified period on periodical basis are required to be justified that for such particular circumstances or compelling circumstances, such appointments on periodical basis were given or for some special work was required to be carried out by the workman concerned or to meet with any exigencies of the work. However, in the instant case, the petitioner board has not been able to justify such periodical appointments and for want of such justification, and in the facts and circumstances of the case, the labour court has come to the conclusion that this has been done by the petitioner board just to deprive the respondent workman from claiming protection under sec. 25F of the Industrial Disputes Act, 1947. Therefore, according to my opinion, merely because the appointment orders were issued on periodical basis or for a specified period, it would not automatically take away the legitimate right of the workman and the provisions of section 2(oo)(bb) would not automatically come into play but it has to be justified by the employer and if it is not justified, then,it amounts to unfair labour practice, exploitation and arbitrariness on the part of the employer. In the instant case, the petitioner has not been able to justify such appointments on periodical basis and, therefore, according to my opinion, for want of such justification, the labour court was right in coming to the conclusion that it amounts to exploitation and arbitrariness on the part of the petitioner board. This aspect has been examined by this court in case of Surat Mahila Nagrik Sahakari Bank v. Mamtaben Mahendrabhai Joshi reported in 2001(2) GLR 1248 wherein, in an identical situation, this court has come to the conclusion that such type of appointments on periodical basis were not justified by the Bank and, therefore, this Court has come to the conclusion that this is clearly arbitrariness and mala fide and unfair practice adopted by the Bank. In the said decision, this Court has, after considering number of decisions cited at the Bar, has observed as under in para 18, 19 and 20 as under:

18. Considering the view of the Apex Court and the various High Courts, Section 2 (oo)(bb) cannot be resorted to when employer has exercised power in a malafide, arbitrary and abused/misused the power with a view to see that the workman may not be entitled to the benefit and protection

available under Sec. 25-F of the I.D Act. However, merely because employer has a right to terminate the service of an employee by satisfying the three conditions enunciated under Sec. 25-F of the Act the same cannot give him an unrestricted right. It is the duty of the employer to establish the fact that such termination is justified in the circumstances of the case. So, without justification of such termination, even in case of complying the provisions of Sec. 25_F such termination is bad, malafide, arbitrary and amounts to unfair labour practice. It is clear that Sec. 25-F has given no positive and unregulated right of retrenchment to the employer. They impose condition precedent before making retrenchment. It is noteworthy that the language of section 25-F is couched in a negative form. The section does not expressly provide that on compliance of the three conditions referred to in the section, the employer shall have an unrestricted right to retrench the workman. The unjustified retrenchment seems to have been effected more in furtherance of a plan to get good reduance of elements deemed undesirable .. .. .. The language of this Sec. 25-F is significant. The termination of service in colourable exercise of power or a result of victimization or unfair labour practice or caprice should be prevented as otherwise some of the fundamental rights and principles which have been noticed above would be violated. Arbitrary conduct or unnecessary harshness on the part of the employer, judged by the normal standard of a reasonable man may be cogent evidence of victimization or unfair labour practice. It is open for the employee to question the `retrenchment' even in case of compliance of Sec. 25 F of the Industrial Disputes Act on the ground of want of benefit or victimization or unfair labour practice or caprice or unnecessary harshness of the employer. Therefore, in such circumstances, the employer shall have to satisfy the Court that there is a compliance of Sec. 25-F of the I.D. Act, 1947 and also to satisfy that there is no malafide, arbitrariness, unnecessary harshness, unfair labour practice or victimization while terminating the service of the workman, and in such cases, the Labour Court shall have to consider these aspects also, while adjudicating the Industrial dispute against the termination of

workman. Mere compliance of Sec. 25-F cannot prove or held that termination is bona fide and genuine. Now, in view of the above observations, the facts of the present case are required to be considered.

19. In the present petition, there is an undisputed fact that the respondent-workman was in service for the period from 13-3-1990 to 21-3-1991 as a Trainee and such training period was not under the provisions of Apprenticeship Act, and during this period of 12 months, the respondent-workman was employed under six separate orders, and thus, she had put in 240 days continuous service, and therefore, the respondent-workman was an employee within the meaning of Sec. 3 (13) of the BIR Act, 1946. Not only that, the respondent-workman was appointed as a temporary Jr.Clerk in the Bombay Market Branch of the petitioner-Bank from 23.3.1991 to 3.2.1992 with notional breaks of one or two in between, and during this period also, she had completed 240 days continuous service with the petitioner-Bank. Alongwith the affidavit-in-reply, the respondent-workman has produced on record copy of the Appointment Orders, which are placed on record from page nos. 82 to 96. The said appointment orders appears to be made in the prescribed forms with a view to avoid the rigor of Sec. 25-F of the I.D Act. There is also an undisputed fact that the five lady employees appointed alongwith the respondent-workman have been subsequently absorbed by the petitioner-Bank and they have been confirmed in service. Punitaben Khushmanbhai Patel was appointed as a Clerk-cum-Cashier-cum-Typist/Field Worker in the Bombay Market Branch on 29.10.1990 and she continued upto 20.1.1993 as a Trainee, and thereafter she was appointed as a Temporary Clerk from 22.1.1993 to 3.5.1995 and thereafter her appointment was made on probation from 5.5.1995 to 4.11.1995 and later on, on 6th November, 1995 she was confirmed in service as such. Now, comparing these dates with Punitaben Patel, the respondent-workman was appointed as a Trainee on 13.2.1990 in the very Branch of the petitioner-Bank on 13.2.1990 as a Clerk Cum Cashier cum Typist and she was appointed as temporary employee from 23.3.1991 to 3.2.1992. Therefore, said Punitaben Patel is junior to the

present respondent-workman. Therefore, once the junior employee continues and the senior' service has been terminated on 3rd February, 1992, the said action on the part of the petitioner-Bank cannot be said to be reasonable. This action on the part of the petitioner-Bank appears to be malafide, victimization or colourable exercise of power resulting into termination by non-renewal of the contract. It is also important to have a look at the chart given by the petitioner-bank wherein details of duration as a Trainee, Temporary, Probationary and confirmation is given with respect to the other lady employees of the petitioner-Bank. The said details are reproduced hereunder :-

Name of employees	Branch Name	Duration as Trainee	Duration as Temporary	Duration as Probation	Date of Con-
Ashaben K. Pachchigar	Khatodra	1.1.90 to 5.1.91	8.1.91 to 18.8.93	20.2.93 to 18.8.93	20.8. 1993
Punitaben K. Patel	Bombay Market Branch	29.10.91 to 20.1.93	22.1.1993 to 3.5.1995	5.5.1995 to 4.11.95	6.11. 1995
Dharmishta R Jinwala	Khatodra	24.11.90 to 3.1.1992	6.01.92 to 29.9.94	1.10.94 to 31.3.95	3.4. 1995
Vaishali K. Bookseller	Head Office	10.11.90 to 27.11.91	29.11.91 to 27.4.91	29.4.94 to 28.11.94	29.11 1994
Jigisha C. Panwala	Khatodara	4.6.92 to 24.6.1993	26.6.93 to 24.8.95	26.8.95 to 25.2.96	26.2. 1996

These details were also furnished before the Labour Court, and the Labour Court has considered the same in light of the deposition made by Pratibaben Pachchigar, Exh. 34. The said witness has confirmed that the above lady workmen have been absorbed in permanent service on the date of confirmation given hereinabove. That, all the aforesaid persons were appointed in a similar fashion as that of the respondent workman

but except the respondent workman, all other five lady have been confirmed in service. Thus, the respondent-workman has been singled out. Therefore, termination of the respondent-workman is not covered by exception of Clause (bb) of Sec. 2 (oo) of the Industrial Disputes Act. It is also an undisputed fact that in the very Branch of the petitioner-Bank, a new employee was recruited on the same post by the petitioner-Bank. So, in the present case, at the time of termination, junior employees worked on the same post and subsequently in the same post, a new employee was appointed by the petitioner Bank and therefore, it proves that this is not a bonafide agreement or contract of employment which gives absolute power to the employer to terminate service of the respondent workman by not renewing the contract of service. Thus, looking to these undisputed facts, the contract of employment does not appear to be a genuine one. The action of termination amounts to clear misuse and abuse of power which amounts to victimization and unfair labour practice adopted by the petitioner-Bank.

20. The learned advocate for the petitioner has heavily relied upon some of the decisions of the Apex Court and this High Court in the matters of M. Venugopalan [Supra] and of Rameshwar Gahlot [Supra]. In the matter of M. Venugopalan [Supra], it was a case of a Probationer and considering the provisions of Regulation 14, the Apex Court has observed that the result whereof will be the termination of service of the appellant shall not deemed to be retrenchment within the meaning of Sec. 2 (oo) even if sub-Sec. (bb) had not been entertained in the said Section. The termination of service of appellant during the period of probation is in terms of the order of appointment, read with Regulation 14 of the Regulations which shall be deemed to be now Rule 48 (2)(oo) of the Corporation Act. So, it was not a case of temporary employment but it was a case of a Probationer and considering the provisions of Regulation 14 and also considering the question of conflict with the Rules framed under 48 (2)(oo), read with Sec. 2 (oo)(bb), the Court has observed that in such circumstances, the termination of probationer cannot be considered to be a retrenchment. In case of Rameshwar

Gehlot [Supra], the Apex Court in terms has observed that if the appointment for fixed period is there, then termination in accordance with terms of such appointment is not illegal but termination would be illegal only when it is established that the management has misused its powers or appointment for fixed period was a colourable exercise of power. Learned Sr. Advocate has also placed reliance upon the following four decisions - they are :

Parshottambhai R Kachariya
v.
State of Gujarat & Ors.
2000 (1) GLH 553;

Executive Engineer, R&B
v.
Rameshkumar K. Bhatt
2000 (1) GLH 263;

Dy. Exective Engineer, Gujarat Maritime Board
v.
Hasmukh M. Jasani
2000 (1) GLR 367; and

Kana Ruda Barvad
v.
Gujarat Water Supply & Sewerage Board
2000 (1) GLH 263.

In case of Kana Ruda Barvad [Supra], the principle which has been decided by this Court is that termination on the ground of non-availability of work and result of closure of a project whether he is entitled to reinstatement or not. It is also observed by this Court that employer is entitled to terminate the service of its employees in terms of the order of appointment which confers power to take action in terms thereof. In case of Dy. Executive Engineer, Gujarat Maritime Board [Supra], it was a case of appointment for a fixed period on purely temporary basis which was extended from time to time and service was terminated after completion of the project. In the said decision, this Court has considered the case of M. Venugopalan [Supra], Ramesh Gehlot [Supra], Uptron Limited [Supra]. In the said decision,

the Court has observed that there is nothing on the record to show that the order of termination was malafide or it was passed in colourable exercise of powers conferred on the authority of the petitioner. In case of Executive Engineer, Roads & Building v. Ramesh Bhatt [Supra], it was a case of appointment made in the post of Driver purely on temporary basis. Government stopped paying grant. One division and three sub-divisions were closed and Sec. 25-F would not apply to a person who was employed for a fixed term. Only the power is misused or vitiated by its malafide exercise of power. The Termination cannot be held illegal. In the said decision, decision in the matter of M. Venugoplan & Gehlot [Supra] has been considered by this Court. In case of Purshottambhai R Kachariya [Supra] which was a case of a daily wager appointed for fixed period and given break, post on which he worked while working on a workcharge employee. In that case, it was the only contention raised by the petitioner that said termination was violative of Sec. 25-F of the I.D Act but no submissions were made in respect to the fact that the employer has misused the power and termination is vitiated with malafide. No such contention was raised before this Court and after considering the case of M. Venugopalan & Ramesh Gehlot, this Court has held that irrespective of length of service, termination would not amount to retrenchment if there is a provision under the said contract for termination of employment. The learned Sr. Advocate has thus submitted that if the appointment has been made on periodical basis and a stipulation has been provided and by afflux of time if the service has come to an end, that covers the exception clause (bb), and therefore, it does not amount to `retrenchment'. Now, the view taken in Ramesh Gehlot's case is also required to be considered because in that case there were no allegations about the misuse of power by the employer or vitiated the termination order by colourable exercise of power or arbitrary and/or malafide action. Therefore, none of the authorities are of any help to the petitioner. According to my opinion, the Labour Court as well as Industrial Tribunal have rightly considered two aspects viz., that at the time of termination of the respondent-workman, juniors have been retained in the same category and that

> subsequent to the termination of the respondent-workman, new employee on similar terms had been appointed by petitioner-Bank. Further, the Industrial Tribunal in paragraph no. 14 of its order has elaborately observed that Dharmistaben remained in service after the termination of the respondent, and Punitaben also was retained in service after the termination of the respondent, who was junior to the respondent, though the work was of continuous and permanent nature. So, the malafide misuse of power and arbitrariness and colourable exercise of powers are proved. Therefore, considering the decision of Apex Court in the matter of Ramesh Gehlot [Supra], the exception of sub-Sec. (bb) is not applicable in the present case and the respondent who has completed 240 days continuous service is entitled to the benefit of protection under Sec. 25-F of the I.D Act, and therefore, the said termination order has rightly been quashed and set-aside by the Labour Court and duly confirmed by the Industrial Court.

In the said decision also, this Court has considered the same situation and has come to the conclusion that such type of periodical appointment must have to be justified by the employer on the basis of the facts and circumstances of the case and otherwise, it amounts to arbitrariness, colourable exercise of the powers and mala fide. Therefore, in the facts and circumstances of the case and also in view of the principles laid down by this Court in aforesaid decision, since the petitioner board has not been able to justify such appointments made on periodical basis, the petitioner board cannot take shelter of the amended provisions of section 2(oo)(bb) of the I.D. Act, 1947. The decision referred to above was challenged by the employer before the Division Bench of this Court and the Division Bench of this Court has confirmed the said decision, reported in 2001(2) GLH 447. Therefore, considering the observations made by this court in the aforesaid decisions and also looking to the facts of the present case, according to my opinion, the observations made and the conclusions drawn by the labour court are legal and valid and the labour court was right in observing that section 2(oo) (bb) will not apply and section 25F of the I.D. Act is required to be followed and thus, the termination order has rightly been held to be violative of section 25F of the Act and was rightly set aside the labour court. Therefore, the labour court was right in passing the award of reinstatement of the

respondent with continuity of service.

As regards back wages, the labour court has considered that the petitioner is a public body and keeping this fact in view, it has granted only 50 per cent of the back wages. According to my opinion, since the petitioner board has not been able to prove gainful employment of the respondent during the intervening period, the respondent was entitled for full back wages. However, since that part of the award has not been challenged by the workman concerned before this Court, according to my opinion, the labour court has taken reasonable view in granting only 50 per cent of the back wages and considering all these aspects of the matter, according to my opinion, in passing the award of reinstatement with continuity of service with 50 per cent of the back wages, the labour court has not committed any error either in law or in facts.

Ms. Acharya has not been able to point out any jurisdictional error and/or procedural irregularity committed by the labour court. She has also not been able to point out any infirmity in the award in question made by the labour court. There is also no error apparent on the face of the record. She has also not been able to point out that the findings recorded by the labour court are perverse or contrary to the evidence on record. This Court, while exercising the powers under Article 226/227 of the Constitution of India, cannot interfere with the findings recorded by the labour court unless it has been established that such findings are perverse. Therefore, there is no substance in the present petition filed by the petitioner board.

For the aforesaid reasons, this petition is dismissed. Rule is discharged. Interim relief granted earlier shall stand vacated with no order as to costs.

In view of the orders passed by this Court in Special Civil Application No. 1148 of 2001, no orders are required to be made on civil application no. 11565 of 2001. Same is, therefore, disposed of with no order as to costs.

Dt. 9.4.2002. (H.K. Rathod,J.)

Vyas